19-464

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~288~~ 49

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE BATES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED SEPTEMBER 13, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 21st day of June, 1883, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal of the Circuit Court South'n Dist. of Ohio.]

WILLIAM C. HOWARD,
Clerk of the Circuit Court of the U. S., S. D. O.

5 STATE OF OHIO, *Supreme Court Thereof:*

I, Dwight Crowell, clerk of the supreme court of the State of Ohio, do hereby certify that a copy of the within writ of error has been duly lodged in the office of the clerk of the said supreme court.

Witness my hand and the seal of said court this 28th day of August, A. D. 1883.

[Seal the Supreme Court of the State of Ohio.]

DWIGHT CROWELL,
Clerk Sup. Court.

[Endorsed:] United States —— court. No. —. The Baltimore & Ohio Railroad Co. *ag't* George Bates. Writ of error. Filed ——, 18—. —— ——, clerk.

6 UNITED STATES OF AMERICA, *ss:*

To George Bates, Greeting:

You are cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein the Baltimore and Ohio Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Geo. W. McIlvaine, chief justice *pro tem.* of the supreme court of the State of Ohio, this nineteenth day of June, in the year of our Lord one thousand eight hundred and eighty-three.

GEO. W. McILVAINE,
C. J., Pro Tem., S. C. of Ohio.

7 Received a copy of the above notice this 30th day of June, A. D. 1883.

GEORGE BATES,
By ATHERTON & FLORY,
His Attorneys.

THE STATE OF OHIO, *Franklin County,* } ss:

Charles H. Kibler, being first duly sworn according to law, deposes and says that on the 2d day of July, A. D. 1883, he served the within citation by delivering to Jesse A. Flory, one of the attorneys of record of said George Bates, a true copy of the within writ of citation; and affiant further says that, as he is informed and verily believes, the within-named George Bates is, and for about two years last past has been, a non-resident of the State of Ohio, and is now, and during said period has been, absent from said State of Ohio.

CHARLES H. KIBLER,

Subscribed in my presence and sworn to before me by said Charles H. Kibler, this 2d day of July, 2*d*, 1883.

[Seal the Supreme Court of the State of Ohio.]

DWIGHT CROWELL,
Clerk Supreme Court of Ohio.

8 [Endorsed:] The Baltimore & Ohio Railroad Company *ag's.* George Bates. Citation.

9 STATE OF OHIO, *Franklin County,* } ss:

At a supreme court of the State of Ohio, begun and held at the court-room in the capitol, in the city of Columbus, within and for said State, on Tuesday, the 2d day of January, in the year of our Lord one thousand eight hundred and eighty-three, before the Honorable John W. Okey, chief justice, and the Honorable William White, W. W. Johnson, George W. McIlvaine, and Nicholas Longworth, judges of said supreme court, among the proceedings were the following, to wit:

10 *Petition. Filed June 29th,* 1875.

THE STATE OF OHIO, *Licking County:*

Court of Common Pleas.

GEORGE BATES, Pl'ff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

The defendant is a corporation duly incorporated under the laws of the State of Maryland, but is the lessee of a certain railroad known as the Central Ohio division of the Baltimore & Ohio railroad, situated within said State of Ohio, and in part within the county of Licking, and was such lessee at the time of the committing of the grievance hereinafter mentioned.

That said railroad company, on the 20th day of October, 1874, at Newark, Ohio, and on the line of said division, operated certain shops for the construction and repair of locomotives and cars to be used on said railroad, and employed therein a large number of laborers, among whom was the plaintiff in said work and labor, and said com-

pany employed certain superior employes to direct & control said laborors, and to whoes orders said laborers, including the plaintiff, was subject, and to which superior servants they were subordinate.

11 That said plaintiff was at the date aforesaid employed generally as the wiper of locomotives, and in said employment was subject to the control and orders of one — Palmer, whoes Christian name is not remembered, but it was also his duty under his said employment, when ordered so to do by his superiors aforesaid, to render such other services in and about said shops as might be required of him, and when rendering the same to be under the control and subject to the orders of such other of the superior servants, foremen of the def't, as had for the time being charge of such work; that on said 20th day of October, 1874, one William Grove was a foreman of the def't, and was invested by the def't with the control of the inferior servants of the def't that he might need to assist in the repairs of locomotives, and the men thus expected to assist were by def't's orders inferior to him in grade and subject to his orders; that on said day the said Palmer ordered the pl'ff to assist the said Grove in putting in a -pring on a certain locomotive then being repaired in said shops, and in obedience to said orders the pl'ff did quit his other work, and, under the orders of said Grove, who then became and was his foreman for the time being and his superior servant, did assist in putting in and adjusting said spring;

12 that in said work and for the purpose of putting in said spring and securing it to its place by a saddle and bolt the said Grove and certain other servants under his direction were attempting by the leverage of pinch bars to bring the spring aforesaid to its place, and the said Grove ordered the pl'ff to, and he did, take his place under said locomotive for the purpose of placeing certain bits of iron under the front of the said pinch bar to assist said leverage.

That said Grove then and there well knew that there was serious and great danger of said bits of iron being thrown out by the pressure upon said pinch bar, and that they were liable to be forced and thrown with great violence against the pl'ff, so that they were likely to endanger the pl'ff and do him great bodily harm, and due care required that peices of wood should be used for the purpose, if anything, and not of iron. That the pl'ff, not being at all accustomed to such work, and then having no knowledge or notice that there was any danger likely to be incurred by him in doing the work aforesaid, and being entirely ignorant that there was any danger of said bits or peices of iron being forced or thrown out from

13 under the point of said pinch bar when ordered so to do by said Grove, took his place under said locomotive near the place where said spring was being put into place, and said Grove, well knowing the danger to which the pl'ff would be subjected thereby, with gross carelessness ordered the pl'ff to place said peice of iron on the top of the said pinch bar and them remain there for the purpose of puitting other bits of iron thereon; and the said pl'ff under such instructions, and without knowing or suspecting the danger to which he would be subjected by obeying said orders, and

using due care to avoid danger to himself, and being guilty of no negligence in that respect, placed said peices and bits of iron on said pinch bar and remained there while said Grove and those under his direction ware bearing down on said pinch bar. That by said pressure the said bits of iron *was* slipped out and thrown with great force and violence at and against the head and into the left eye of the pl'ff, immediately bursting the eyeball and destroying the sight of said eye. That said pl'ff in consequence thereof suffered great and excrusiating pain for a long time thereafter, lost five weeks of time, in which he was totally unable to labor, and has permanently lost the use of said organ.

14 That in all the acts aforesaid the said Grove was guilty of negligence and gross carelessness and in all of the same was the superior officer of the pl'ff, to whose orders the pl'ff was in all things subject and to whom the pl'ff was subordinate, and in all of the same the pl'ff was guilty of no negligence, but exercised due and ordinary care.

Wherefore, by reason of the matters aforesaid, the pl'ff says he has sustained damage in the sum of five thousand dollars, for which he brings suit and demands judgment against defendmant.

G. ATHERTON.

THE STATE OF OHIO, } *ss:*
Licking County, }

George Bates, the pl'ff, makes oath and says: That the facts stated and allegations in the foregoing petition are true, as he verily believes.

GEORGE BATES.

Signed by said George Bates in my presence, and sworn to by him before me, this 29th day of Jan'y, 1875.

I. W. BIGELOW, *Clerk.*

15 *Demurrer. Filed Sept. 20th,* 187[illegible]

THE STATE OF OHIO:

Court of Common Pleas.

GEORGE BATES, Plaintiff,
against
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

And now comes the defendant and demurs to the petition in this case on the grounds that it does not state facts sufficient to make a cause of action against the defendant.

Wherefore def't prays judgment.

CHARLES H. KIBLER & BUCKINGHAM,
Att'ys for Def't.

16 And afterwards, to wit, at the September term, A. D. 1876, of said court, to wit, on the 22d day of December, 1876, the following proceedings were had:

Filed April 17, 1877.

GEORGE BATES *v.* BALTIMORE & OHIO RAILROAD CO.

This cause was heard on the demurrer to petition, and was argued by counsel. On consideration whereof the court, being fully advised in the premises, find that said demurrer is well taken, and therefore orders that the same be and it is sustained at the costs of the plaintiff, taxed at $—, to which judgment the plaintiff accepts. Thereupon leave is given plaintiff to file an amended petition, and cause continued.

And afterwards, to wit, at the February term, A. D. 1877, of said court, to wit, on the 7th day of April, the following proceedings were had:

GEORGE BATES *v.* THE BALTIMORE & OHIO RAILROAD COMPANY.

This day came the parties, by their attorneys, and thereupon the plaintiff, not asking to amend his petition, it is now ordered and adjudged that the petition of the plaintiff be, and the same is
17 hereby, dismissed, and that the defendant recover of the plaintiff its costs in this behalf expended, taxed at $—; and it is further ordered that the plaintiff pay his own costs herein, taxed at $—, and in default thereof that execution issue therefor, which order and judgment the plaintiff, by his counsel, excepts.

STATE OF OHIO, }
Licking County, } *ss*:

I, S. S. Wells, clerk of the court of common pleas in and for said county, do hereby certify that the foregoing is a correct and true copy of the journal entries of said court in the foregoing-named case, as appears by the journals of said court in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Newark, Ohio, this 16th day of April, A. D. 1877.

[SEAL.]

S. S. WELLS, *Clerk*,
By C. F. BIGELOW, *Deputy*.

18 *Petition in Error. Filed April 17th*, 1877.

THE STATE OF OHIO, *Licking County:*

District Court.

GEORGE BATES, Plaintiff in error,
against
THE BALTIMORE & OHIO RAILROAD COMPANY, Defendant in error.

The plaintiff in error, George Bates, complains of the defendant in error, the Baltimore & Ohio Railroad Company, and says that at the September term, A. D. 1876, of the court of common pleas of said county, the said railroad company procured an order and judgment of said court sustaining the demurrer of the defendant to the

petition of the plaintiff; and that at the February term, A. D. 1877, of said court, the said railroad company, by the consideration of said court, procured an order and judgment against said plaintiff, dismissing the petition in said case and ordering the plaintiff to pay the costs of said case, which orders and judgment were rendered and made in a case then pending therein, wherein the said plaintiff was plaintiff and said defendant was defendant. The plaintiff in error herewith files an authenticated transcript of the journal entries
19 and of the final judgment rendered in said case in the court below, together with the original papers and pleadings in said cause, and the said Bates says there is manifest error to his prejudice in said proceedings and judgment, and that the court erred—

1. In sustaining the demurrer of the railroad company aforesaid to the petition of said Bates.

2. In dismissing plaintiff's petition and requiring plaintiff to pay the costs made in said case.

3. Other reasons.

The said Bates therefore asks that said order sustaining said demurrer and the final judgment dismissing said cause be reversed, and the said case remanded to the court of common pleas for final trial and judgment.

GIBSON ATHERTON,
Att'y for Pl'ff in Error.

20 Journal No. 2. June Term, A. D. 1877, Newark, July 7th, 1877, page 23.

GEORGE BATES *v.* THE BALTIMORE AND OHIO RAILROAD CO.

This cause came on to be heard upon the petition-in-error, the transcript, and the original papers and pleadings from the court of common pleas, of Licking county, Ohio, and was argued by counsel, on consideration whereof the court find that there is error therein apparent upon the record to the prejudice of the plaintiff in error in this, to wit, said court erred in sustaining the demurrer of the said railroad company to the petition of the plaintiff and in rendering judgment against the plaintiff dismissing his petition. It is, therefore, considered by the court that the judgment aforesaid be reversed and held for naught, and that the plaintiff in error recover of the defendant in error his costs in this behalf expended, taxed at $——, to which judgment the defendant in error excepts. It is further ordered that this case be remanded to the said court of common pleas for trial, and that a special mandate be sent to said court to carry this judgment into execution.

21 And afterwards, to wit, in the vacation of said court the following mandate was recorded:

Mandate. Filed May 23d, 1878.

GEORGE BATES *vs.* THE BALTIMORE AND OHIO RAILROAD CO.

THE STATE OF OHIO, *Licking County,* } *ss:*

To the court of common pleas within and for said county, Greeting

Whereas in a certain action of damages lately before you wherein George Bates was plaintiff and the Baltimore & Ohio Railroad Company, defendant, a judgment was rendered by you in favor of the said Baltimore & Ohio Railroad Company for the sum of —— with costs, a transcript of which judgment and of the record in said action was brought into the district court within and for said county of Licking by our writ of error; and whereas at the June term of said district court, A. D. 1877, on consideration of the said transcript it was ordered and adjudged by the said district court that the said judgment be reversed and held for naught, and that the plaintiff in error recover of the defendant in error his costs in this be-
22 half expended, taxed at $——, to which judgment the defendant in error excepts. It is further ordered that this case be remanded to the said court of common pleas for trial, and that a special mandate be sent to said court to carry this judgment into execution. You are therefore hereby commanded that without delay you cause execution to be had of the said judgment of the district court according to law, the said writ of error to the contrary notwithstanding.

23 *Summons.*

THE STATE OF OHIO, *Licking County,* } *ss:*

To the Sheriff of Licking County:

You are commanded to notify the Baltimore & Ohio Railroad Company that they have been sued by George Bates in the court of common pleas of Licking county, and that unless they answer by the 31st day of July, A. D. 1875, the petition of the said plaintiff against them filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on or before the 12th day of July, A. D. 1875.

Witness my hand and the seal of said court at the city of Newark, this 1st day of July, A. D. 1875.

[SEAL.] J. W. BIGELOW, *Clerk.*

Plaintiffs' Claim.

Amount claimed, $5,000 damages.

J. W. BIGELOW, *Clerk.*

24 Received this writ July 1st, A. D. 1878, and on the 9th day of July, 1875, I served the same by delivering person-

ally a true copy thereof to A. B. Jackson, the regular freight agent in my county, of the within-named corporation, to wit, the Baltimore & Ohio Railroad Company.

S. H. SCOFIELD, *Sheriff.*

Fees:

Service	45
Mileage	10
Copy	25
Return	35
	$1.15

25 *Petition. Filed Dec. 1st, 1877.*

In the Court of Common Pleas of Licking County, Ohio.

GEORGE BATES, Pl'ff,
ag's.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Def'ts.

To the honorable court of common pleas of Licking county, State of Ohio, and in the sixth judicial district of Ohio:

Your petitioner, the Baltimore and Ohio Railroad Company, respectfully shows that your petitioner is the defendant in the above-entitled action, and that the same was brought by said George Bates, plaintiff, on or about the 29th day of June, A. D. 1875, in this court, and that plaintiff is, and was at the time of bringing this suit, a citizen of the State of Ohio, and that your petitioner is, and was at the time of bringing this suit, a foreign corporation and body corporate, created solely by and under the laws of the State of Maryland, and, so far as a body corporate can be, was then, and still is, a citizen of the State of Maryland; that there is, and was at the commencement of this action, a controversy therein between a citizen of the State of Ohio, to wit, said George Bates, plaintiff in said action, and a citizen of the State of Maryland, to wit,
26 your petitioner, the said Baltimore and Ohio Railroad Company; and further, that said plaintiff claims, in the summons and petition in this suit as damages against your petitioner, the sum of five thousand dollars, and that the matter in dispute therefor exceeds, exclusive of costs, the sum of five hundred dollars.

And your petitioner further represents that this suit has not been finally tried, but that the same is pending for trial in said court of common pleas, and that your petitioner desires to remove this suit before the trial thereof into the next circuit court of the United States, to be held in the southern district of Ohio, in the sixth circuit, in pursuance of the provisions of the act of Congress approved June 22d, 1874, and to be found on page 113 of the Revised Statutes of the United States, section 639.

And your petitioner further says that it has made and files herewith the affidavit required by said act of Congress, and section three of which affidavit is hereunto annexed, marked A, and which your

petitioner prays may be taken and made a part of this petition; that
8 your petitioner is ready and wil-ing to give such good and sufficient surety as this court may direct for petitioner's doing all acts
27 and things required to be done by the provisions of law upon the removal of a suit into the United States court; and petitioner offers herewith its bond, executed by it under its corporate seal, and by Walter C. Quincy and Charles H. Kebler, of the city of Newark, Licking county, Ohio, as sureties, in the penal sum of five hundred dollars, conditioned that your petitioner shall enter into the next circuit court of the United States, to be held in the southern district of Ohio, in the sixth circuit, on the first day of its session, copies of all process against the petitioners, and of all pleadings, depositions, testimony, and other proceedings in said court, as by said act of Congress are required to be done on the removal of a suit into the United States courts — are good and sufficient surety, according to the provisions of law, upon the removal of a suit into the United States courts.

Your petitioner, therefore, prays that said bond may be accepted as good and sufficient surety, according with said provisions of law, that said suit may be removed into the next circuit court of the United States, to be held in the southern district of Ohio, in
28 the sixth circuit, pursuant to the statute of the United States in such case made and provided, and that no further proceedings may be had in this court. And your petitioner will ever pray, &c.

BALTIMORE & OHIO RAILROAD CO.,
By J. BUCKINGHAM & CHARLES H. KIBLER,
Its Counsel.

THE STATE OF MARYLAND, *City of Baltimore*, } *ss:*

John W. Garrett, being *sworn* duly sworn, deposes and says: That he is the president of said Baltimore and Ohio Railroad Company and its agent duly authorized in the premises, and that he believes the facts and allegations in the foregoing petition contained to be true.

JOHN W. GARRETT, *President.*

Subscribed in my presence and sworn to before me by said J. W. Garrett this 27th day of October, A. D. 1877.

WM. BONE, *J. P.*

29 *Bond. Filed Dec. 11th*, 1877.

Know all men by these presents, that the Baltimore and Ohio Railroad Company and Walter C. Quincy and Charles H. Kibler, of Newark, Ohio, are held and firmly bound unto George Bates, of Newark, Ohio, in the sum of five hundred dollars; for the payment of which, well and truly to be made, the said Baltimore and Ohio Railroad Company and said Quincy and Kibler, jointly and severally, bind themselves firmly by these presents.

Signed by said Baltimore and Ohio Railroad Company, by John

W. Garrett, its president, and sealed with its corporate
[SEAL.] seal, and the names and seals of said Quincy and Kibler, this 27th day of November, 1877.

Provided, however, and these presents are upon the express condition that whereas the Baltimore and Ohio Railroad Company aforesaid has filed its petition in this court of common pleas of Licking county, Ohio, for the removal into the next circuit court of the United States to be held in the southern district of Ohio, in the sixth circuit, of a cause now pending in the said court of common
30 pleas, wherein the said George Bates is plaintiff and the Baltimore and Ohio Railroad Company is defendant, pursuant to the provisions of section 639 (chapter 7, title 13) of the Revised Statutes of the United States, page 113:

Now, therefore, if the said Baltimore and Ohio Railroad Company shall enter in said circuit court of the United States for the southern district of Ohio on the first day of its next session copies of all the the process against the said Baltimore and Ohio Railroad Company, and of all pleadings, depositions, testimony, and other proceedings in said cause, then this obligation shall be void; otherwise, to be and remain in full force and virtue.

Witness the said Baltimore and Ohio Railroad Company, by John W. Garrett, its president, and the corporate seal of said company and the names and seals of said Quincy and Kibler the day and year aforesaid.

[SEAL.] THE BALTIMORE AND OHIO RAILROAD COMPANY,
[SEAL.] By JOHN W. GARRETT, *President.*
WALTER C. QUINCY. [SEAL.]
CHARLES H. KIBLER. [SEAL.]

Attest:
ANDREW ANDERSON,
To the signature of John W. Garrett, pres.

31 *Affidavit. Filed Dec. 1st*, 1877.

GEORGE BATES, Plaintiff,
against
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Civil action pending in the court of common pleas of Licking county, Ohio.

THE STATE OF MARYLAND, } ss:
City of Baltimore, }

John W. Garrett, being sworn according to law, deposes and says: That The Baltimore and Ohio Railroad Company, defendant in the above-entitled action, is a corporation and body corporate, created solely by and under the laws of the State of Maryland, and is incorporated by and under the act of the General Assembly of said State of Maryland, and that said company is, and at the commencement of this action was, a citizen of the State of Maryland; that its

principal office is in the city of Baltimore, in said State of Maryland; that it is not a citizen of the State of Ohio; that it is the defendant in the above-entitled action; that the said George Bates, the plaintiff in said action, is, and at the commencement of said action was,
32 a citizen of the State of Ohio; that said action was brought on or about the 29th day of June, 1875, in the said court of common pleas within and for the county of Licking, State of Ohio, in the sixth judicial district of Ohio; and this deponent further says that he has reason to believe and does believe that from prejudice and local influence the said defendant in said action will not be able to obtain justice in said court, and therefore makes this application for the purpose of removing the said suit into the circuit court of the United States for the southern district of Ohio, in the sixth circuit, in pursuance of the statutes in such case made and provided; and this deponent further says that he is president of the said Baltimore and Ohio Railroad Company and its agent duly authorized in the premises and for the purpose aforesaid, and further more says not.

J. W. GARRETT, *Pres't.*

Sworn to and subscribed before me, by said John W. Garrett, this 27th day of November, 1877.

WM. BONE, *J. P.*

33 STATE OF MARYLAND, *Baltimore City,* } *set:*

I hereby certify that William Bone, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, at the time of so doing [was] a justice of the peace of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof I hereto set my hand and affix the seal of the superior court of Baltimore city this 27th day of November, A. D. 1877.

[SEAL.] GEO. ROBINSON,
Clerk of the Superior Court of Baltimore City.

34 And afterwards, to wit, at the October term, A. D. 1877, *afore* said court, to wit, on the 22d day of December, A. D. 1877, the following proceedings were had:

Filed May 23d, 1878.

GEORGE BATES, Pl'ff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

This day came the parties, by their attorneys, and thereupon this cause came on to be heard upon the petition of the defendant for the removal of this cause to the circuit court of the United States of the southern district of Ohio, and was argued by counsel. On consideration whereof the court, being fully advised in the premises, find that said defendant now has no right to have said suit removed for trial to

the circuit court of the United States. It is, therefore, ordered that the application for removal be, and the same is hereby, denied, and the petition of the defendant for removal be, and the same is hereby, dismissed at the costs of the defendant, taxed at $——; to which order of the court overruling said petition the defendant, by its attorneys, excepts, and cause continued.

35 *The Answer. Filed January 12th*, 1878.

THE STATE OF OHIO, *Licking County:*

Court of Common Pleas.

GEORGE BATES, Plaintiff,
-g'st
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

For answer and defence in this case defendant says:

That it is not true that the plaintiff had no knowledge or notice that there was any danger likely to be incurred by him in doing the said work, or that he was ignorant that there was any danger of said bits or pieces of iron being forced or thrown out from under the point of said pinch bar; that it is not true that he was not at all accustomed to such work; that it is not true that he was ordered or directed by said Grove to take his place under said locomotive; that it is not true that said Grove ordered plaintiff to place any pieces of iron on the top of said pinch-bar; that it is not true that said Grove ordered or requested plaintiff to remain under said locomotive for the purpose of putting other bits of iron thereon.

36 That it is not true that plaintiff got under said locomotive under any instructions from said Grove or without knowing or suspecting the alleged danger to which he would be subjected thereby; that it is not true that plaintiff used due care to avoid danger to himself or was guilty of no negligence in the premises, or that using due care to avoid danger to himself, and being guilty of no negligence in that respect, placed said bits of iron on said pinch bar and remained there while said Grove and others were bearing down on said pinch bar; that it is not true that due care required that pieces of wood should be used for the purpose of doing said work, if anything, and not of iron; that it is not true that said Grove, in any particular or in any part of the premises, was guilty of any carelessness or negligence whatever; that it is not true that said Grove was the foreman or superior servant of plaintiff.

And defendant further says that the plaintiff being duly and fully warned of the danger he would be in if he remained under said locomotive, and being requested to come out from under the same, notwithstanding remained under it after improperly, without

37 orders, placing a nut instead of a piece of flat iron under the poin of said bar, and received and suffered said injury by and through his fault and want of care, and with full knowledge of his danger brought the accident upon himself.

Wherefore defendant says it is not liable in the premises, and prays judgment.

J. BUCKINGHAM &
CHARLES H. KIBLER,
Atty's for Defendant.

THE STATE OF OHIO, }
Licking County, } *ss:*

George F. Naylor, being sworn, says: That he is general foreman of the defendant's shops, in the city of Newark, and agent of the defendant, and that he believes the facts and allegations in the foregoing answer contained to be true.

GEORGE F. NAYLOR.

Subscribed in my presence and sworn to before me by said Naylor this 12th day of January, 1878.

S. S. WELLS, *Clerk.*

38 *Reply. Filed January 21st,* 1878.

THE STATE OF OHIO, *Licking County:*

Court of Common Pleas.

GEORGE BATES, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD, Defendant.

And now comes the plaintiff, and for reply to the answer of the defendant herein says that it is not true that the plaintiff was duly and fully or at all warned of the danger he would be in if he remained under said locomotive; that it is not true that he was requested to come out from under the same; that it is not true that the plaintiff placed said nut instead of a flat piece of iron improperly and without order under the part of said bar; that it is not true that the plaintiff received and suffered said injury by and through his own fault and want of care, and with full knowledge or any knowledge whatever of his danger brought the accident upon himself. And the plaintiff denies each and all of the allegations of said answer in that behalf. Wherefore plaintiff demands judgment as in his petition prayed for.

G. ATHERTON & J. A. FLORY,
Atty's for Pl'ff.

39 THE STATE OF OHIO, }
Licking County, } *ss:*

George Bates, being duly sworn, says: That the facts stated and allegations in the foregoing reply are true, as he verily believes.

GEO. BATES.

Signed in my presence and sworn to before me, this 21st day of January, A. D. 1878.

S. S. WELLS, *Clerk.*

40 Filed May 23d, 1878.

GEORGE BATES *vs.* BALTIMORE & OHIO RAILROAD CO.

This day came the parties, and thereupon to try the issue joined between the parties came a jury, to wit, Albert Hatch, Peter Stover, Jocob Fulk, James Brown, W. A. McFarland, Joseph Osburn, Josiah McKinney, Jeremiah Kneager, Truman Hoover, J. H. Traverse, Joseph C. Wehrl, Griff F. Rosbaugh, who, being duly empanneled and sworn the truth to speak upon said issues, having heard the evidence, argument of counsel, and charge of the court, retired to consult of their verdict, and afterward brought into court the following verdict, to wit:

Verdict for Plaintiff.

THE STATE OF OHIO, *Licking County:*

Court of Common Pleas of said County. January Term, Jan. 23rd, 1878.

Civil Action.

GEORGE BATES, Pl'ff, *vs.* THE BALTIMORE AND OHIO R. R. Co.

We, the jury, being duly empanneled and sworn, find the issues in this case in favor of the plaintiff, and assess the amount due to the plaintiff from the defendant at the sum of $4,000.00.

A. HATCH, *Foreman.*

It is therefore considered and adjudged by the court that the said plaintiff recover of the said defendant the said sum of four
41 thousand dollars, together with his costs herein expended, taxed at $——; also that defendant pay its own costs herein, taxed at $——, and in default thereof that execution issue.

And thereupon came the defendant, and filed his motion for a new trial herein.

And afterwards, to wit, at the term aforesaid of said court, to wit, on the 12th day of March, A. D. 1878, the following proceedings were had:

GEORGE BATES *vs.* THE BALTIMORE & OHIO R. R. Co.

This cause came on further to be heard upon the motion of defendant for a new trial, and was argued by counsel, on consideration whereof, the court, being fully advised in the premises, finds that said motion is not well taken, and therefore orders that the same be, and it is, overruled; to which judgment the defendant excepts.

Thereupon came the defendant, and presented to the court his bill of exceptions in this case, which, being inspected, the court finds to be true, and signs and seals the same, and, on motion of defendant, it is ordered that said bill of exceptions be filed in this case (which is done) and be made a part of the record herein.

42 *Petition in Error. Filed May 23d, 1878.*

THE STATE OF OHIO, *Licking County:*

District Court.

THE BALTIMORE AND OHIO RAILROAD CO., Plaintiff in Error,
vs.
GEORGE BATES, Defendant in Error.

The said railroad company complains and says: That at the January term, 1878, of the court of common pleas of said county, in a certain civil action therein then pending, wherein said George Bates was plaintiff and said railroad company was defendant, a final judgment was rendered by said common pleas court in favor of said Bates, and against said railroad company, for the sum of four thousand dollars, and for costs of suit, taxed at $——. Certified transcripts of the journal entries and of said final judgment in said action and the original files and pleadings in said action are hereto attached and herewith filed and made a part of this petition in error.

That in the proceedings and final judgment of said court of common pleas error occurred, to the prejudice of the plaintiff in error, which it assigns and points out as follows:

43 1. That court erred in overruling and refusing the petition and application of the plaintiff in error to remove said action for trial in the circuit court of the United States for the southern district of Ohio.

2. That court erred in overruling the motion of plaintiff in error for a new trial.

3. That court erred in permitting defendant in error to give improper testimony and in refusing to rule out improper evidence given by defendant in error.

4. That court erred in its charge to the jury both in refusing to charge as requested by plaintiff in error and in the charge as given.

5. Other errors.

The plaintiff in error, therefore, prays that said judgment be reversed, and that such other proceedings as are appropriate be had.

J. BUCKING LAW,
CHARLES H. KIBLER,
Atty's for Pl'ff in Error.

Summons waived and voluntary appearance of defendant in error entered.

May 23rd, 1878.

G. ATHERTON,
Att'y for Defendant in Error.

Filed May 23d, 1878.

44 *Certified Copy of Journal Entry. Filed Feb'y 28th*, 1880.

THE STATE OF OHIO, }
Licking County, } *ss:*

In the District Court.

BALTIMORE AND OHIO RAILROAD COMPANY
vs.
GEORGE BATES.

This day came the parties and thereupon this cause came on to be heard upon the petition in error, the errors assigned, the certified and authenticated transcript of the journal entries, and the final judgment of said court of common pleas in said action and the original files, papers, and pleadings therein mentioned, and was argued by counsel. On consideration whereof the court being fully advised in the premises finds that there was error in the record and proceedings of said court of common pleas in this to wit: That the court erred in overruling and denying the petition and motion of said railroad company to remove said action for trial to the circuit court of the United States for the southern district of Ohio, and for that reason the said final judgment of said court of common pleas complained of ought to be reversed and held for nought. It is, therefore, considered and adjudged by the court that the final judgment aforesaid of said court of common pleas be, and the same is hereby, re-
45 versed and held for nought at the costs of defendant in error, taxed at $——, to which findings and judgment the defendant in error excepts. It is further ordered that a special mandate be sent down to the court of common pleas to further proceed in this case according to law.

STATE OF OHIO, }
Licking County, } *ss:*

I, S. S. Wells, clerk of the district court within and for said county, and in whose custody the files, journals, and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is taken and copied from the journal entry of the proceedings of the district court within and for said county, and that said foregoing copy has been compared by me with the original entry on said journal in my office, and that the same is a correct transcript thereof.

In witness whereof I do hereto subscribe my name officially and affix the seal of said court at the court-house in Newark, in said county, this 16th day of October, A. D. 1878.

S. S. WELLS, *Clerk*,
By C. F. BIGELOW,
Dept. Clerk.

a citizen of the state in which the suit is brought is a defendant, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner, and also for his then appearing and entering special bail in the cause, is special bail was requisite therein."

In 1875 Congress passed the act entitled "An act to determine the jurisdiction of the circuit court of the United States, and to regulate the removal of causes from state courts, and for other purposes." United States Statutes at Large, Vol. 18, p. 470. This act does not specifically repeal any previous act, but has the general provi-
52 sion, "that all acts and parts of acts in conflict with the pro visions of this act, are hereby repealed." And the plaintiff insists that the third clause of section 639 is thereby repealed, and that the suit could only be removed on a petition filed in the state court, "before or at the term at which said cause could be first tried, and before the trial thereof," as provided in the act of 1875. This act was intended by Congress as a revision of many previous acts upon the same subject, and there has been much difference of opinion in the Federal courts as to the extent to which it is a substitute for those acts or parts thereof, but its effect in relation to the first, second, and third clauses of section 639 has been conclusively determined by the Supreme Court of the United States. In the case of King *vs.* Cornell, 106 U.S., 395, it was decided that the first and second clauses of that section were in conflict with the act of 1875, and were therefor repealed. In the case of the American Bible Society *vs.* Grove, 101 U. S., 610, it was held that the act of 1875 has not changed the third clause of section 639, and that removals on account of "prejudice or local influence," still depend on that section. The provision that a petition for removal on that ground may
53 be filed at any time before the trial or final hearing of the cause must, therefore, be regarded as still in force, and in this case the petition was filed before the final trial.

In reference to the objection to the acceptance of the bond for the reason that no evidence was given that the sureties thereon were good and sufficient, it is enough to say that the decisions are nearly, if not quit-, uniform; that this objection is waived if not made in the State court at the time of the application for removal. It does not appear that plaintiff received such proof, and we hold that the action of the court of common pleas could not be sustained on that ground.

The most serious question in the case is in reference to the bond offered by the defendant. The petition expressly states that the application for the removal is made in pursuance of the provisions of section 639, and upon examining the bond filed with the petition it will be found that the condition is in accordance with the requirements of that section, but is substantially different from that required by the act of 1875 in several important particulars, but especially in omitting the provision "for paying all costs
54 that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto.

It is insisted by the defendant that in a case in which the petition for removal is in accordance with the provisions of section 639 the case is also to be governed by the provisions of that section in reference to the security required. The plaintiff claims that the provisions of the act of 1875, so far as they relate to the bond to be given by the petitioner, are to be substituted for the requirements of section 639, and are to be observed in all cases of removal under that section.

The proper construction of the act of 1875, in this respect, is by no means free from doubt, but no reason is apparent for requiring security for the payment of costs in cases removed under the last act, and not in those removed under the former, and upon considering the different provisions of the two statutes upon this subject we are led to the conclusion that in regard to the bond required the act of 1875 was intended as a substitute for and repeals that part of § 639 which provides for the security to be given by the petitioner.

55 This point has not been decided, so far as we are aware, by the Supreme Court of the United States, but has been determined by circuit courts in a number of cases. In the case of McMurray *vs.* The Connecticut General Life Insurance Co., 9 Chicago Legal News, 324, Judges McKennan and Cadwalder held that the act of 1875 takes the place of all former acts in the requirements which it makes for the removal of all causes to which it is applicable; that even though a removal is sought under the third clause of § 639 of the Revised Statutes, the requirement of § 3 of the act of 1875 in regard to the nature of the bond extends to such a case, as being a case mentioned in § 2 of that act, which to that extent at least repeals all prior acts on that subject. This case was approved in the case of Torrey *vs.* The Grant Locomotive W'ks, 14 Blatchford Rep., 269, in which Judge Blatchford held that even if the petitioner claimed the benefit of the longer time allowed by § 639, he must give the bond required by the act of 1875, and that the bond filed in that

56 case was insufficient, because it contained no provision for costs. This point was also decided in the same way in *in* the case of Webber *vs.* Bishop, 13 Fed. Reporter, 49, in the circuit court of the northern district of New York. No case has been cited in which a contrary decision has been made. If, then, it is conceded that the bond in this case is not in accordance with law, we are next to consider whether for that reason the State court was justified in refusing to accept it, and thereupon proceeding to trial and final judgment. Upon this point we are satisfied that the action of the court of common pleas is sustained by the decided weight of authority as well as the general principles of law. A reasonable regard for the rights of the opposite party requires of the petitioner a substantial compliance with the conditions imposed by the act of Congress before he avails himself of the privileges which it confers. This point has also frequently been the subject of judicial decision. In the case of Torrey *vs.* The Grant Locomotive Works, *supra*, it was held that the filing of the bond, conditioned a required by the act of 1875, is a condition precedent to the remova of the cause to the

federal court, and that if the required bond has not been filed the court has no jurisdiction.

57 In the case of Burassk *vs.* Hale, in the circuit court for the district of Indiana, 7 Bissell, 96, although the State court had accepted the bond and ordered that no further steps be taken in the cause in that court, Judge Gresham held, on a motion to remand the cause, that as the bond contained no provision for the payment of costs the surety would be liable for no costs if the suit should be sent back to the State court; that the defects in the bond could not be cured by amendment in the circuit court; that the Federal courts had no power to dispense with, modify, or change any of the provisions of the statutes authorizing the removal of causes from one jurisdiction to another, and that the jurisdiction of the court over a controversy rightfully in its possession, as in that case, could not be dislodged except by fully complying with the act of Congress.

Other decisions to the same effect might be cited. We are of the opinion that the court of common pleas would not have been justified in accepting the bond offered by the defendant.

Judgment of the district court reversed, and that of the court of common pleas affirmed.

58 I, Dwight Crowell, clerk of the supreme court of the State of Ohio, do certify that the above and foregoing is a true and correct copy of the records on file in this office and of the opinion of the court in this cause of George Bates *vs.* The Baltimore and Ohio Railroad Company.

Witness my hand and the seal of said court this 16th day of July, A. D. 1883.

[Seal the Supreme Court of the State of Ohio.]

DWIGHT CROWELL,
Clerk Supreme Court of Ohio.

Endorsed on cover: Ohio supreme court. No. 288. The Baltimore and Ohio Railroad Company, plaintiff in error, *vs.* George Bates. Filed 19th September, 1883.

119-464

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1886

No. 49

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE BATES, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN K. COWEN,
HUGH L. BOND, JR.,
Of Counsel.

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1886

No. ~~255~~ 49

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE BATES, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On the 29th day of June, 1875, the defendant in error, a citizen of the State of Ohio, filed his petition in the Court of Common Pleas of Licking County, Ohio, to recover from the plaintiff in error, a corporation of the State of Maryland, the sum of $5,000 damages for injuries received by him while in the employment of the Railroad Company. To that petition the Railroad Company filed a general demurrer on the ground that it did not state facts sufficient to make a cause of action. The Court of Common Pleas sustained the demurrer, and at the February Term, 1877, dismissed the petition. By petition in error, the case was taken to the District Court for Licking County, and by that court the decision of the Court of Common Pleas was reversed and the cause remanded for trial, July 7, 1877. Thereupon, the Railroad Company filed its petition and bond accompanied by the affidavit of John W. Garrett, its President, for the removal of this

cause into the Circuit Court of the United States for the Southern District of Ohio, under the provisions of section 639, sub-section 3 of the Revised Statutes. (Record, pages 9, 10, 11 and 12). The Court of Common Pleas denied the application for removal, on the ground that it was made too late, and to its order denying the application exception was duly taken, (Record page 12). A transcript of the proceedings was also filed in the Circuit Court of the United States for the Southern District of Ohio; and in that court the plaintiff suffered a non suit.

This case went to trial in the Court of Common Pleas on petition, answer and replication; there was a verdict for the plaintiff in the sum of $4,000 and judgment thereon. The case was then taken to the District Court by petition in error, the first assignment of error being "that the Court erred in overruling and refusing the petition and application of plaintiff in error, to remove said action for trial in the Circuit Court of the United States for the Southern District of Ohio"; (Record, page 16). The District Court reversed the judgment of the Court of Common Pleas, on the ground that the court erred in overruling and deny ng the petition and motion to remove the action for trial to the Circuit Court of the United States; (Record, page 17). The case then went to the Supreme Court of the State of Ohio by petition in error, in which the first ground of error alleged was that "the District Court erred in finding and holding that the Court of Common Pleas erred in overruling and denying the petition and motion of said Baltimore and Ohio Railroad Company, to remove said action for trial to the Circuit Court of the United States for the Southern District of Ohio;" (Record, page 18). The Supreme Court of Ohio reversed the judgment of the District Court, and affirmed the judgment of the Court of Common Pleas, on the ground that the condition of the bond filed with the petition was not in accordance with the law, in that it did not provide for the payment of the costs in case the cause should be held to have been improperly removed; (See opinion of the Court, Record pages 19, 20, 21, 22.)

A writ of error to this Court was allowed by Hon. George W. McIlvaine, Chief Justice of the Supreme Court of Ohio.

Assignment of Errors.

The assignment of errors in the petition was as follows:

1. That in said suit there is drawn in question the validity of a statute of, and of an authority exercised under the United States, and that the decision is against the validity of said statute and of such authority.

2. That in said suit a right and privilege are claimed under the constitution and statutes of the United States, and the decision is against the right and privilege set up and claimed by the plaintiff in error under such constitution and statutes.

The plaintiff in error contends that the Supreme Court of Ohio erred in denying to it the right to remove this suit to the Circuit Court of the United States upon the petition, bond and affidavit filed in this suit in the Court of Common Pleas of Licking County. The removal was sought under subsection 3 of section 639 of the Revised Statutes, which provides for removals on the ground of prejudice and local influence. The portion of section 639 that provides for such removals is a reproduction of the act of March 2, 1867, Statutes at Large, Volume 14, Chapter 196. The language of section 639, reproduced from the Act of 1867, is as follows: "Any suit commenced in any State court, wherein the amount is dispute, exclusive of costs, exceeds the sum or value of $500, to be made to appear to the satisfaction of said court, may be removed, for trial, into the Circuit Court, for the district where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section. * * * *

Third.—When a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if, before or at the time of filing said petition, he makes and files in said State Court an affidavit, stating that he has reason to believe and does believe that from prejudice and local influence, he will not be able to obtain justice in such State court.

In order to such removal, the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said State court good and sufficient surety for his entering in such Circuit Court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony and other proceedings in the cause; or, in said cases where a citizen of the State in which the suit is brought is a defendant, copies of all process, pleadings, depositions, testimony and other proceedings in the cause concerning or affecting the petitioner; and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein. It shall thereupon be the duty of the State court to accept the surety and to proceed no further in the cause against the petitioner, and any bail that may have been originally taken shall be discharged."

The plaintiff in error contends that the removal provided for in the portion of section 639, above quoted, is in no way affected by the act of March 3, 1875; that when the plaintiff in error complied with all the provisions of that section, its right to remove this suit was complete; and that the Supreme Court of Ohio erred in deciding otherwise.

Points of Law.

The question presented by the record in this case is a question of the construction of two statutes. It is not disputed that the petition, bond and affidavit filed by the plaintiff in error in the Court of Common Pleas, were in the form prescribed by section 639, of the Revised Statutes, quoted above. The condition of the bond follows the exact language of that section. The defendant in error contends, however, that the condition of the bond should follow the requirements of section 3 of the act of March 3, 1875, so as to provide for the payment of costs in case the Circuit Court should hold that the suit had been improperly removed. The question, therefore, is, Has the act of March 3, 1875, repealed the provisions of section 639, so far as they relate to the bond to be filed with the petition for the removal of cases mentioned in sub-section 3 of that section?

The only repealing clause contained in the act of 1875 is that contained in section 10, which provides "that all acts and parts of acts in conflict with the provisions of this act are hereby repealed." The question, then, is whether the provisions of section 639, which prescribe the form of bond to be filed for the removal of cases under sub-section 3, on the ground of "prejudice and local influence," conflict with the provisions of the act of 1875, which prescribe the form of bond to be filed in the removal of cases under that act. The provision regulating the form of bond to be filed under the act of 1875 is contained in section 3 of that act. The language of that provision is as follows: "Section 3. That whenever either party or any one or more of the plaintiffs or defendants entitled to remove *any suit mentioned in the next preceding section* shall desire to remove *such suit* from a State court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such State court *before or at the term at which said cause could first be tried and before the trial thereof*, for the removal of such suit into the Circuit Court to be held in the district where such suit is pending, and shall make and file *therewith a bond*, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit, and any bail that may have been originally taken shall be discharged."

It is perfectly clear from the language just quoted, that unless the present suit is one of those mentioned in section 2 of the act of 1875, the provisions of section 3 of that act do not provide the form of proceeding to be followed for its removal. It is equally clear from the language just quoted, that if this suit is one of those mentioned in section 2 of the act of 1875, then the provisions of the 3rd

section of that act govern its removal, not only in the form of bond to be filed, but in the time when the petition for removal must be filed.

Now this Court has repeatedly decided that the provisions of section 3 of the act of 1875 do not govern the removal of suits on the ground of prejudice and local influence, under subsection 3 of section 639, so far as the time for filing the petition for removal is concerned. Bible Society vs. Grove, 101 U. S., 610; King vs. Cornell, 106 U. S., 395; Hess vs. Reynolds, Administrator, 113 U. S., 73.

In the case of Bible Society vs. Grove, *supra*, this Court said; "Suits cannot be removed from the State courts on account of prejudice or local influence, unless the party opposed to him who petitions for the removal is a citizen of the State in which the suit is brought; the express provision of the statute is, that when a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed 'on the petition of the latter.' Rev. Stat. Sec. 639, subsection 3. The act of March 3, 1875 (18 Stat. 470), has not changed this provision of the Revised Statutes. Removals for this cause still depend on that section which is a reproduction of the act of 1867, 14 id. 558." 101 U. S. p. 611.

In Hess vs. Reynolds, *supra*, this Court, speaking through Mr. Justice Miller, said: If the case is only removable under the act of 1875, and if that statute repeals or supersedes all other statutes for the removal of causes from the State courts into the Circuit Courts of the United States, then the motion was made too late, for there was a period of five years in the Circuit Court of Ionia County during all which time the case stood for trial. But though such has often in argument been asserted to be the effect of the act of 1875, the language of the repealing clause of it is not so comprehensive. That language is, "That all acts and parts of acts in conflict with the provisions of this act are hereby repealed." This implies very strongly that there may be acts on the same subject which are not thereby repealed.

The usual formula of a repealing clause intended to be universal is, that all acts on this subject, or all acts coming

within its purview, are repealed, or the acts intended to be repealed are named or specifically referred to. In this case the effect of the statute as a repeal by implication, arising from inconsistency of provisions, or from the supposed intention of the Legislature to substi ute one new statute for all prior legislation on that subject, is not left to its usual operations, but the statute to be repe led must be in conflict with the act under consideration, or that effect does not follow. And this was wise, for Congress well knew that there were many provisions of the laws for such removals, which might or might not come under the provisions of the act of 1875, and which might be exercised under regulations different from that statute, and accordingly these were left to stand, so far as they did not conflict with that act.

The provisions of the act of 1867, by which removals are authorized on the ground of prejudice and local influence, are embodied in the Revised Statutes in the 3rd clause of section 639. It declares that in such a case, with the requisite citizenship, when the non-resident party files the proper affidavit, at any time before the trial or final hearing of the suit, it shall be removed. We do not think this provision is embraced in the act of 1875, which says nothing about prejudice or local influence, and is not in conflict with that act. We are of opinion that this clause of section 639 remains, and is complete in itself, furnishing its own peculiar cause of removal and prescribing for reasons appropriate to it the time within which it must be done. One of these reasons is, that the prejudice may not exist at the beginning, or the hostile local influence may not become known or developed at an earlier stage of the proceedings. Congress, therefore, intended to provide against this local hostility, whenever it existed, up to the time of the trial." 113 U. S., pp. 79 and 80.

The two cases above cited decide expressly that a suit between a citizen of the State in which the suit is brought, and a citizen of another State, wherein the latter has filed an affidavit of prejudice and local influence, is not "any suit mentioned" in section 2 of the act of 1875. The present suit is one between such parties, in which such an

affidavit has been filed; it is not, therefore, any suit mentioned in section 2 of the act of 1875; and hence its removal is not governed by section 3 of that act. The act of 1875 prescribes the proceedings to be taken for the removal only of the suits mentioned in section 2 of that act. If the suits provided for by subsection 3 of section 639, of the Revised Statutes are not suits mentioned in section 2 of the act of 1875, then the proceedings prescribed by the act of 1867 and reproduced in section 639 of the Revised Statutes must still hold good in the removal of the latter class of suits. Otherwise, the law provides no form of proceeding for the removal of such suits.

The above decisions construe the words "suits mentioned in the next preceding section", to mean suits whose removal is sought on any of the grounds mentioned in section 2. That the words mean nothing more, is clear from the context.

It is submitted that the effect of the act of 1875, was to strike out subsections 1 and 2 of section 639 of the Revised Statutes, but to leave the remainder of that section in full force, so as to provide a complete system of proceeding for the removal of suits, on the ground of prejudice and local influence.

The question at issue is in no way affected by the fact that suits of the class removable on the ground of prejudice and local influence, under section 639, are also suits between citizens of different States, and as such removable also under the act of 1875, on the ground of citizenship alone. When the removal of such a suit is sought on the the ground of prejudice and local influence, the system of proceeding will be found prescribed by section 639. When removal is sought on the ground of citizenship alone, the system of proceeding is prescribed by the act of 1875.

In other words, these are two distinct systems of proceeding for the removal of causes. One governs removals on several different grounds, the other governs removals on the ground of prejudice and local influence alone. There may be a removal under one system, or under the other system; but there can be no such thing as a removal partly under the act of 1875 and partly under section 639.

There can be no clearer demonstration of the fact that the provisions of the act of 1875, apply only to removals under that act; that is, to suits whose removal is sought on the grounds mentioned therein, than is furnished by an examination of the language of section 3, relative to the bond to be filed. By the provisions of section 3, the party seeking the removal must file a petition "in such suit, in such State Court *before or at the term at which* said cause could be first tried and before the trial thereof," &c., "and shall make and file *therewith* a bond with good and sufficient surety" for his entering in the Circuit Court, "on the first day of its then next session, a copy, &c." That is to say, the bond therein provided is the bond to be filed with the petition thereinbefore provided, "before or at the term at which said cause could be first tried and before the trial thereof." In short, that bond is the bond to be filed with petitions for removal under the act of 1875, and with those petitions only. This Court will not, by construction, extend the scope of section 3 of the act of 1875, beyond what is covered by the plain language of its provisions, so as to work the repeal of a prior statute, and add a new complication to the already intricate law of removals.

We submit that the construction we have given to the act of 1875, is fully supported by the language of the act itself, by the decisions of this Court and by common sense.

JOHN K. COWEN,
HUGH L. BOND, JR.,
Of Counsel for Plaintiff in Error.

119-464

Office Supreme Court U. S.
FILED.
DEC 26 1885
JAMES. H. McKENNEY,
CLERK.

SUPREME COURT

Of the United States.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error,

vs.

GEORGE BATES,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

BY

Gibson Atherton and J. A. Flory.

SUPREME COURT
OF THE UNITED STATES.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Plaintiff in Error,*

vs.

GEORGE BATES, *Defendant in Error.*

BRIEF FOR THE DEFENDANT IN ERROR.

This is a proceeding in error to reverse the judgment of the Supreme Court of the State of Ohio, in the case of George Bates *vs.* the Baltimore and Ohio Railroad Company, which can be found reported in full in 39 Ohio St. Rep. 157.

The only question involved in this case is: Is there error upon the face of the record, prejudicial to the railroad company, in the Supreme court affirming the judgment of the Court of Common Pleas, of Licking county, Ohio, in not certifying the case of George Bates *vs.* the Baltimore and Ohio Railroad Company, to the United States Circuit Court?

We claim the Court of Common Pleas was right, in refusing to certify the cause to the United States Court, and proceeding no further in the case.

FIRST,

Because the petition and bond were not filed within the time reqqired by law.

SECOND,

Because the bond and the conditions thereof were not such as are required by law to effect a removal.

THIRD,

Because there was no evidence furnished to the court to show that the sureties on the bond were good and sufficient sureties.

FIRST.

This suit was commenced June 29, 1875, answer day named in the summons (Record, page 8) was July 31, 1875: three terms of court, to-wit: October term 1875, and January and April terms, 1876, passed at which, the case, under the Ohio code, could have been tried, and before it was tried.

Ohio Code of Civil Procedures, Sections 260, 262, 306, 307, 308, 59, and 103.

Babbitt *vs.* Clark, 103 U. S., 606.

A general demurrer was filed September 20, 1875: the case tried at the February term, 1877, and final judgement rendered (Record, page 6); case taken to the District court, where judgment of the Common Pleas was reversed at its June term, 1877, (Record, page 7), and cause remanded for trial; then the cause could have been tried at the August term, 1877, of the Court of Common Pleas, but that term, and a large part of the October term, 1877, passed before petition to remove was filed.

The petition to remove was filed too late under the Act of Congress, of March 3, 1875.

United States Stat. of 1874 and 1875, page 470.

Babbitt *vs.* Clark, 103 U. S. Rep., 606.

Pullman P. C. Co. *vs.* Speck, 113 U. S. Rep. 84.

Gregory *vs.* Hartley, 113 U. S. Rep., 742.

The counsel for railroad company, recognizing the fact that the application for removal was made too late under the Act of March 3, 1875, do not aver in the petitition for removal, that a term of court had not passed at which the cause could have been tried and that the case had not been tried, but attempt to make the application under paragraph 3, of section 639. Revised Statutes, page 113, and form their petition and bond under that section.

The whole of Section 639, of Revised Statutes, was repealed by the Act of March 3, 1875.

Burdock *vs.* Hale U. S. C. Ct. D. of Ind. 1 L. and E. Rep. No. 10—246.

Clippingers Admr. *vs.* N. V. Ins. Co. 2 Cin. L. Bulletin 2 18

Danville R. R., Case 7 Chicago Legal News 241.

Chandler *vs.* Coe 22 Am. Repr. Smith, Common Constitutional Construction, Secs. 786 and 787

Murdick *vs.* City of Memphis, 20 Wall U. S. 517.

United States *vs.* Tyner, 11 Wall 88.

7 Am Decisions 99 note.

Lorane Plank R. Co. *vs.* Cotton, 12 Ohio St 263.

King *vs.* Connell, 106 U. S. 396.

The counsel for railroad company say that Part 3 of Sec. 639 was not repealed by Act of March 3. That the inconsistency between the two is not sufficient to repeal the former In the case of Morse *vs.* Vance, 1 Ohio Rep 10. Judge Hitchcock holds: "It is a well settled rule that when a law enacts a thing to be done different from the

same thing required by a former law, the first thereby becomes repealed without any direct expression of such intention by the law making power."

Certainly the provisions of the Act of March 3, requiring the petition for removal to be filed "before or at the "term at which the case could be first tried and before the "trial thereof" is inconsistent with the right to file the petition at a later date, and even if the ground for ~~retrial~~ removal was not repealed the time for filing the petition was. The conditions required to be inserted in the bond for removal by the latter Act, are inconsistent with and different from those required in the 639th section Revised Statutes. If the Act of March 3 did not repeal the 639th section, which of the conditions required by both acts should be used?

It is claimed that repeals by implication are not favored. But is this a repeal by implication within the meaning of the authorities that so hold?

A repeal by implication, as we understand, is, where there is a statute existing upon a certain subject, a subsequent statute is passed upon the same subject containing no provision repealing the former, in such cases, the law making power having power to repeal the former law, and not having exercised that power, it raises the presumption that it had no *intention* to repeal the former act or it would have exercised its power and have done so, but not having shown such *intention* to repeal the former act, the courts hold, that the latter act does not repeal the former only in so far as its provisions are inconsistent with the provisions of the former that they cannot be reconciled.

That is not the facts with this case. By the 10th section of the Act of March 3, 1875, it is provided "that all acts "and *parts* of acts in conflict with the provisions of this "act are hereby repealed." Here congress has shown an *intention* to repeal something and it is the duty of the court

to ascertain what that intention was, and carry it out to the full extent It is well settled by authority that even the litteral words of a statute must give away to the intention of the law making power, and if that is true, how much more so is it that an abstract proposition of law must give way to such intention, or, in other words, not apply in such a case.

It seems to us, there is no doubt but that it was the intention of Congress, in passing the Act of March 3, 1875, to repeal all of the class of cases provided for in Sec. 639 Revised Statutes.

First—Take the title of the Act of March 3, 1875 Second—Then the language of the first section, which provides, "That the Circuit Court shall have original cogni- "zance of *all suits* of a civil nature, at *common law*, or in "equity." Third—Then the second section, which provides, "That *any suit*, of a civil nature, at law, or in equity," may be removed. Fourth—Then the language of the third section, which provides, That the person "entitled to remove "*any suit* mentioned in the second section of this Act," the language of which, with Section 1, is the same as that of Section 2, of Article 3, of the United States Constitution, under and by virtue of which, the United States Courts, can take or obtain jurisdiction. Fifth—Then looking at the other provisions of the Act of 1875, with its broad and comprehensive language, and that it provides a single, straight and uniform mode of procedure, so as not to allow experiments in the State (per Miller, Judge in Cavler *vs* Spreck, 113 U. S. 87). Then the fact that the local prejudice resulting from the war, that gave rise to the Act of 1867, had ceased to any longer exist.

From all of the above facts, there seems to us to be no doubt but that it was the intention of Congress, in passing the Act of March 3, 1875, to consolidate and codify all the

law upon the subject relating to this class of cases, provided for in Sections 2 and 3, of the United States Constitution, "between citizens of different states," into one single section, with one mode of procedure applying to all.

This, then, being the intention of Congress, the court should have nothing to do but to carry out that intention, and hold that the Act of March 3, 1875 repealed and superceded all former Acts relating to suits "between citizens of different states," and that Section 639 was wholly repealed by it. We are aware that this court in the case of 113 U. S. Report, has decided that the third paragraph of Section 639 was not repealed by the Act of 1875, but for reasons above, we respectfully ask the court for a reconsideration and overruling of that case.

But if this third paragraph was not superceded by the Act of 1875, this case was not removable under that paragraph, because the petition was not filed before the trial of the case

The Revised Statutes, paragraph 3, provided tha the petition for removal should be filed before "*the trial*" of the case. This case was put at issue by the demurrer, under Section 260, Ohio Code, and "A trial is a judicial examination "of the issues, whether of law or of fact, in an action or pro-"ceeding." Ohio Code, Section 262, S. and C. Statutes 1020. So that this case was finally tried and decided and final judgment rendered before the petition for removal was filed, and the petition for removal does not aver the case had not been tried, while the record showed it had been once tried.

But, says the counsel for the railroad company, where the judgment of the court has been set aside and a new trial granted, the case is removable, and cite the case of the Insurance Company *vs.* Dunn, 19 Wallace Rep., 214. That case was decided under the act of March 2, 1867, which required the petition for removal to be filed "at any time be-

"fore the *final hearing or trial* of the suit." While in the Revised Statutes the word trial is transposed from after the word "final," and placed before it, so as to make it conform to act of 1866.

This change was not made for nothing. The case of Insurance Company *vs.* Dunn had already been decided, which it is presumed Congress had full knowledge of before they enac ed the Revised States. "It is apparent that this change "was not the result of accident, but was deliberately made to "secure uniformity upon the subject, in view of the conflict-"ing decisions between the Federal and State Courts in the "following cases: Ackerly *vs.* Vilas, 1 Abb., (U. S.) 284 "-ec. 24, Wis., 165. Johnson *vs.* Morrill, Wo dsworth, 390. "Insurance Co. *vs.* Dunn, 20 Ohio Stat., 175, and same "case, 19, Wall., (U. S.) 211. Bryant *vs.* Rich, 106 Mass., "192." Whittier *vs.* Ins. Co.; 20 American, 187.

This change in the wording of the statutes appears to have been ma le apparently to get around the construction given to the act of 1867, in the 19 Wall. Report; for if Congress, having full knowledge of that decision, had intended to follow the Act of 1867, they would have worded it the same. The change was apparently made to do away with the injustice resulting from the Act of 1867, under the construction given to it by the 19 Wall. Report, as is well illustrated by the case at bar. Here the defendant below submit ed the case to the court, which decided Bates had no cause of action, and rendered a judgment in its favor. This was all well. Th n the case was taken to the District Court where the judgment bel w was set aside, holding that Bates did have a good cause of action; then the case was taken to the S preme court, which decided that Bates was entitled to recover, both of which latter decisions fully settled the liability of the railroad company to Bates, leaving nothing o be done to entitle him to recover but to introduce, on the

retrial of the case, the evidence to sustain the facts stated in his petition. The decisions of the District and Supreme courts were binding and obligatory upon the rights of the parties thereafter, and it would be a gross outrage upon the rights of Bates, and an insult to the courts of Ohio, to now permit this railroad company, after it haa taken all its chances in the state courts, and found liable, to now make a lottery of the state courts, by removing the case to a court upon which the decisions of the state court settling the rights of the parties, has no binding force or effect. It was to get around these outrageous proceedings, that was permitted under the Act of 1867, that the change in the language of the Acts of the Revised Statutes, and of March 3, 1875, were made so as to bring the law back to the same state it had been in since the foundation of our national government; and under which the rights of parties had been long since settled by judicial decisions.

Whittier *vs.* Hartford Ins. Co., 20 Am., 167.

King *vs.* Connell, 106 U. S., 397.

SECOND.

The Court of Common Pleas properly refused to certify the case to the Circuit Court because the petition for removal, and the bond itself showed, that the bond presented with the petition for removal did not contain the conditions as required by the Act of March, 1875. Even if the third paragraph of Section 639, Revised Statutes, was not repealed by the Act of March 3, 1875, that part of Section 639 relating to the bond to be given, is distinct from paragraph 3, as it referred to the other paragraph and grounds of removal of Section 639, and the conditions of the bond required by the Act of March, 1875 being different and inconsistent with the conditions required to be in the bond under the Revised Statutes, repealed the latter; so that if

a removal can be made under the Revised Statutes, the conditions of the bond must be those required by the Act of March 3, 1875.

In Terry *vs.* Locomotive Works, 14 Black, C. C. Rep., 260, it was held: "A suit brought in a state court in August, "1875, and removal into this court were taken under sub-"division 3 of Section 639 of the Revised Statutes. The "bond given was a bond as is provided for by Section 639, "and not such a bond as provided for by Section 3 of the "Act of March 3, 1875 (18 U. S. Stat. 470). It contained "no provisions for costs. Held: That the suit was not prop-"erly removed."

See cases there cited.

20 Am. Law Register, pg. 38.

Burdick *vs.* Hale *et al*, 8 Chicago E. News, 192.

Bates *vs.* Railroad Co., 39 Ohio St. 157.

Webber *vs.* Bishop *et al*, 13 Federal Rep., 49.

McMurdy *vs.* Con. G. L. Ins. Co., 9 Chicago L. News, 324.

Farmers' L and Trust Co. *vs.* C. P. and S. R. R. Co., 12 Chicago L. N.. 65.

The bond presented did not contain the conditions that the party removing shall enter in the Circuit Court, "A "copy of the record," and "pay all costs that may be "awarded by said Circuit Court, if said court shall hold "that said suit was wrongfully or improperly removed "thereto," as required by Section 3 of the Act of March, 1875.

There can be found no case in either state or federal court where it has been held, that the state court lost its jurisdiction, unless the bond, with the conditions prescribed by law, with good and sufficient surety, *is filed with the petition*, in the state court. On the contrary, it is in all cases held, that it is only on complying with all of the requirements prescribed by law, that a party can be taken from one jurisdiction to another against his consent. This is affirmatively shown and required by the very language of the statutes, for it states, "*it shall then* (*i.e.*, on filing of petition to remove "*and file therewith a bond with conditions specifically required* "*by the Act*) *be the duty of the state court to accept said pe-* "*tition and bond, and proceed no further in such suit.*" The language of this Act not only authorizes the state court to act in accepting *the bond*, but also leaves it to proceed if such bond as required by law is not filed. This is further shown by the provisions of the seventh Section of the Act, which authorizes the Circuit Court to enforce the state court to return the record in the case removed, only when the party "have complied with the provisions of this Act "for the removal of the same."

"The right to remove a suit from a state court to the "Circuit Court of the United States is statutory, and to ef- "fect a transfer of jurisdiction, *all* the requirements of the "statutes must be followed. If this is done the controversy "is brought properly within the jurisdiction of the Circuit "Court, and may be lawfully disposed of there; but if not, "the rightful jurisdiction continues in the state court."

Per Waite, Chief Judge in Babbitt *vs.* Clark, 1 3 U. S. Rep., 610.

In the removal cases, 100 U. S. Rep., the court says, on page 474:

"As in the case of the sufficiency of the bond, the ques- "tion here is not whether, if the statement of the petitioner

"in that particular had been denied. It would have been "competent for the state court to institute an inquiry on "that subject, but whether on the facts, *as they appear on* "*the face of the record*, which also shows how they should "have appeared to the court below, that court was justified "in proceeding further in the suit. We fully recognize the "principle heretofore asserted in many cases, that the state "court is not required to let go its jurisdiction until a case "is made which upon its face shows that the petitioner can "remove the cause as a matter of right."

When is it shown "on the face of the record * * the "petition can remove the cause as of right?" Assuredly not, when it appears by the averments of the petition and the bond itself, that it did not contain the conditions prescribed by the law. And, therefore, showing that the conditions required by law to effect the removal were not complied with:

In Gregory *vs.* Hartley, 113 U. S., 742, was a writ of error to reverse the Supreme Court of Nebraska, on the single ground that it decided that the District Court of Lancaster county had jurisdiction to proceed with the suit after a petition for the removal to the Circuit Court had been made and filed in the District Court. The District Court refused to grant the petition for removal and surrender its jurisdiction and proceeded to a final hearing and decree. The refusal of the District Court was not made for want of a jurisdiction ground that could not be waived, but for the reason, as appears from the report that the petition for removal was not filed within the time prescribed by law (an objection that might be waived.) This court said, page 745: "To our minds, it is very clear "that there was no error in the rulings of the courts below, "upon the federal question involved, which alone can be "considered by us. The District Court was not bound to

"surrender its jurisdiction until a case was made *which on* "*the face of the record* showed that the petitioners were in "law entitled to a removal. The mere filing of a petition "is not enough, unless, when taken in connection with the "rest of the record, it shows on its face that the petitioner "has under the statute the right to take the suit to another "tribunal," and affirmed the judgments of the state courts.

In Insurance Co. *vs.* Pechner, 99 U. S. Rep, 183, and Armor *vs.* Armor, 95 U. S., 186, the state *Nice prius* court refused to certify the case to the Circuit Court, but proceeded to judgment, as was done in this case, and being brought to this court through writs of error, this court says "The court (*ie*, state court), had the right to take the "case as made by the party himself, and not inquire further. "If that was not sufficient to oust the jurisdiction, there was "no reason why the court should not proceed with the cause," and affirmed the judgments of the state courts, which it could not have done, if, by mere filing of the petition without the "requisite bond," ousted the state court of jurisdiction.

See Merchants Na. Bank *vs* Brown, 4 Wood, 263.

Counsel for the railroad company cite the case of Dennis *vs.* Alachua Co., 3 Wood, 688. decided by District Judge Settle, as deciding that the bond can be amended, and that it requires no action of the state courts for removal, and then attempt to draw the conclusion, that the state court has no jurisdiction, even if the bond is defective. The filing of the petition and bond, with the conditions prescribed by law, are just as essential to the jurisdiction of the Circuit Court as the issuing and serving of a summons, and how the judge arrives at the conclusion that a court can act when it has no jurisdiction, we cannot comprehend He cites no authority to sustain him, while the authorities cited by him to sus-

tain his sixth ground, seem to negative his conclusion, by showing that it is only by the "presentation of the *proper* "petition and bond" that the state court loses i s jurisdiction and the Circuit Court receives it, and the authorities above cited, as well as Wells ex. parte, 3 Wood, 128, sustain the position, that the state court has the right to act, and negative the conclusion attempted to be drawn by council, from the Dennis case. Even if the bond could have been amended on application, it does not affect this case. Here the case was fully argued by council. At the time of application for removal, the court made its decision. No application was made to the court to amend this bond or file another, but the company contending, as it now does, that the bond was proper, took its exception, and was willing to stand its chances (if it go defeated on the merits) upon the petition and bond being proper, as they were and appear upon record, and get the case reversed. Having taken its chances it has no right now to raise the question that it seeks, and probably could, as to what would have been its rights, and the duty of the state court, if they had amended, or made an application to amend the bond.

So that, conceding that if this bond had contained the conditions required by law, and the petition for removal so recited, and on the filing of them in the state court, it would have ousted its jurisdiction, and made it subsequent proceedings void. Yet, where the petition or bond are *not* such as required by law, as shown upon the face of this record, it is the same as if none had been filed, and the state court retained its jurisdiction, and its holding, and the holding of the Supreme Court of Ohio were proper, and not erroneous and should be affirmed.

THIRD.

There was no justification or evidence given to the court that the sureties on the bond were sufficient, and in the ab-